and libraries program would be beneficial to the administration of the program in the prevention of waste, fraud and abuse, however, as it would strengthen incentives for beneficiaries and service providers to comply with the statute and our rules.[74] We therefore amend our rules to bring all E-rate beneficiaries and service providers within the ambit of the red light rule. Accordingly, we amend our rules at 47 C.F.R. §§ 1.8002 and 1.8003 to require all entities that participate in the schools and libraries universal service support mechanism to obtain an FCC Registration Number. This rule change shall go into effect pursuant to the *DCIA Order*, and shall apply to all applications and recovery actions pending at that time.[75] Thereafter, USAC shall dismiss any outstanding requests for funding commitments if a school or library, or service provider, as applicable, has not paid the outstanding debt, or made otherwise satisfactory arrangements, within 30 days of the date of the notice provided for in our commitment adjustment procedures. In this regard, we expressly recognize that a school or library's ability to pay outstanding debts may be dependent on action by state or local officials on budgetary requests, and the timing of such budgetary action may be considered in determining satisfactory repayment options. We direct USAC to work with the Wireline Competition Bureau and Office of Managing Director to resolve any implementation issues associated with this rule.

43. Applications will not be dismissed pursuant to our red light rule if the applicant has timely filed a challenge through administrative appeal or a contested judicial proceeding to either the existence or amount of the debt owed to the Commission. Our recent *DCIA Order* expressly notes that appeals made to USAC shall be deemed administrative appeals.[76] Our rules thus provide the opportunity to contest any finding that monies are owed to the fund, and thereby toll the potentially harsh consequences of the red light rule. This addresses the concerns raised by some parties that deferring action on pending requests when there is an outstanding commitment adjustment action would unfairly dissuade parties from pursuing their legitimate appeal rights.[77]

44. Moreover, even if outstanding debts to the universal service fund have been repaid, we think it appropriate to subject subsequent applications from beneficiaries that have been found to have violated the statute or rules in the past to greater review. We believe it prudent to subject any pending applications to more rigorous scrutiny if USAC has determined, based on audit work or other means, that the applicant violated the statute or a Commission rule in the past.[78] Such action is consistent with the framework previously enunciated in our *Puerto Rico Department of Education Order* for situations in which one or more entities is under investigation, or there is other evidence of potential program violations.[79] Such heightened scrutiny could entail, for instance, requiring additional documentary evidence to demonstrate current compliance with all applicable requirements, or submission of a

[74] *See* California Reply Comments at 7-8 (arguing service provider should be barred from participating until it has satisfactorily settled the matter; applicant should be barred from participating for one funding cycle); K&S Comments at 12 (defer action on funding request for any beneficiary and associated service provider for which there is an outstanding commitment adjustment action); SBC Comments at 9 (withhold action on funding requests from applicant to facilitate collection of outstanding debt and protect the fund).

[75] *See DCIA Order*.

[76] *Id.* at 6542-43 para. 6 n.20.

[77] *See* CoSN Comments at 8; Council of Great City Schools Comments at 8; EdLiNC Comments at 7.

[78] *See* K&S Comments at 12-13 (heightened scrutiny for one funding cycle); *but see* LaErate Comments (objecting to more rigorous scrutiny).

[79] *Federal-State Joint Board on Universal Service, Petition of the Puerto Rico Department of Education to Release Funds Associated with the Schools and Libraries Universal Service Support Mechanisms for Years 2001 and 2002*, CC Docket No. 02-6, Order, 18 FCC Rcd 25417, 25422 (2003) (*Puerto Rico Department of Education Order*) (when USAC obtains information relating to potential program violation, it is appropriate to subject funding requests to a more intensive review, tailored to the nature of the allegations that have been raised).

corrective plan of action to address past errors. It may also include site visits or other investigatory activities. Such heightened scrutiny could continue as long as necessary. We envision, however, that in most instances, such heightened scrutiny would no longer be necessary in subsequent years, after USAC determines that a pending application is compliant with the statute and Commission requirements.

### B. Document Retention Requirements

#### 1. Background

45. Currently, the Commission's rules require each entity to maintain "for their purchases of telecommunications and other supported services at discounted rates the kind of procurement records that they maintain for other purchases."[80] Service providers also are required to retain records of rates charged to and discounts allowed for entities receiving supported services.[81] The Commission's rules do not specify how long such records should be maintained nor do they require entities or service providers to maintain records to demonstrate compliance with all program rules.

46. In the *Schools and Libraries Second Further Notice*, we sought comment on whether to amend our rules governing the retention of records related to the receipt of universal service discounts.[82] Specifically, we invited comment on whether all records related to the receipt or delivery of discounted services should be maintained by the beneficiary and/or service provider for a period of five years after the last day of delivery of the discounted services.[83] We also sought comment on the types of documents that would be sufficient to demonstrate compliance with program rules.[84] In addition, we sought comment on whether service providers should be required to comply with periodic program audits or reviews to assure program compliance, including identifying the portions of bills that represent the costs of services provided to eligible entities.[85] Commenters were also asked to discuss ways to limit waste, fraud and abuse and improve the Commission's ability to enforce the rules governing the schools and libraries program.[86]

#### 2. Discussion

47. Most commenters addressing this issue support the adoption of a five-year record retention rule, but suggest that the Commission should provide clear guidance on what information needs to be retained for possible audits and/or reviews.[87] We agree. Therefore, in this Order, we amend section 54.516 of our rules to require both applicants and service providers to retain all records related to the application for, receipt and delivery of discounted services for a period of five years after the last day of service delivered for a particular Funding Year.[88] This rule change shall go into effect when this order becomes effective and, as such, will apply to Funding Year 2004 and thereafter. We conclude that the adoption of a five-year record retention requirement will facilitate improved information collection during the auditing process and will enhance the ability of auditors to determine whether applicants and service

[80] 47 C.F.R. § 54.516.

[81] 47 C.F.R. § 54.501(d)(3).

[82] *Schools and Libraries Second Further Notice*, 18 FCC Rcd at 26948 para. 88.

[83] *Id.* at 26948-49 paras. 88-89.

[84] *Id.* at 26948 para. 88.

[85] *Id.* at 26948-49 para. 89.

[86] *Id.* at 26949 para. 90.

[87] *See, e.g.,* BellSouth Comments at 9-10; California Reply Comments at 9; CoSN Comments at 6.

[88] *See infra* Appendix B.

providers have complied with program rules.[89] Further, we believe that specific recordkeeping requirements not only prevent waste, fraud and abuse, but also protect applicants and/or service providers in the event of vendor disputes.

48. Although we agree with commenters that an explicit list of documents that must be retained in the recordkeeping requirement would be most useful for service providers and program beneficiaries,[90] we do not believe that an exhaustive list of such documents is possible. We base this conclusion on our knowledge that due to the diversity that exists among service providers and program beneficiaries, the descriptive titles or names of relevant documents will vary from entity to entity. To address commenters' concerns, however, we provide for illustrative purposes the following description of documents that service providers and program beneficiaries must retain pursuant to this recordkeeping requirement, as applicable:

- *Pre-bidding Process*. Beneficiaries must retain the technology plan and technology plan approval letter. If consultants are involved, beneficiaries must retain signed copies of all written agreements with E-rate consultants.

- *Bidding Process*. All documents used during the competitive bidding process must be retained. Beneficiaries must retain documents such as: Request(s) for Proposal (RFP(s)) including evidence of the publication date; documents describing the bid evaluation criteria and weighting, as well as the bid evaluation worksheets; all written correspondence between the beneficiary and prospective bidders regarding the products and service sought; all bids submitted, winning and losing; and documents related to the selection of service provider(s). Service providers must retain any of the relevant documents described above; in particular, a copy of the winning bid submitted to the applicant and any correspondence with the applicant. Service providers participating in the bidding process that do not win the bid need not retain any documents.

- *Contracts*. Both beneficiaries and service providers must retain executed contracts, signed and dated by both parties. All amendments and addendums to the contracts must be retained, as well as other agreements relating to E-rate between the beneficiary and service provider, such as up-front payment arrangements.

- *Application Process*. The beneficiary must retain all documents relied upon to submit the Form 471, including National School Lunch Program eligibility documentation supporting the discount percentage sought; documents to support the necessary resources certification pursuant to section 54.505 of the Commission's rules, including budgets;[91] and documents used to prepare the Item 21 description of services attachment.

- *Purchase and Delivery of Services*. Beneficiaries and service providers should retain all documents related to the purchase and delivery of E-rate eligible services and equipment. Beneficiaries must retain purchase requisitions, purchase orders, packing slips, delivery and installation records showing where equipment was delivered and installed or where services were provided. Service

[89] *See* Council of the Great City Schools Comments at 7.

[90] *See, e.g.*, Council of the Great City Schools Comments at 7.

[91] *See* 47 C.F.R. § 54.505.

providers must retain all applicable documents listed above.

- *Invoicing*. Both service providers and beneficiaries must retain all invoices. *Beneficiaries must retain records proving payment of the invoice, such as* accounts payable records, service provider statement, beneficiary check, bank statement or ACH transaction record. Beneficiaries must also be able to show proof of service provider payment to the beneficiary of the BEAR, if applicable. Service providers must retain similar records showing invoice payment by beneficiary to the service provider, USAC payment to the service provider, payment of the BEAR to the beneficiary, through receipt or deposit records, bank statements, beneficiary check or automated clearing house (ACH) transaction record, as applicable.

- *Inventory*. Beneficiaries must retain asset and inventory records of equipment purchased and components of supported internal connections services sufficient to verify the location of such equipment. Beneficiaries must also retain detailed records documenting any transfer of equipment within three years after purchase and the reasons for such a transfer.

- *Forms and Rule Compliance*. All program forms, attachments and documents submitted to USAC must be retained. Beneficiaries and service providers must retain all official notification letters from USAC, as applicable. Beneficiaries must retain FCC Form 470 certification pages (if not certified electronically), FCC Form 471 and certification pages (if not certified electronically), FCC Form 471 Item 21 attachments, FCC Form 479, FCC Form 486, FCC Form 500, FCC Form 472. Beneficiaries must also retain any documents submitted to USAC during program integrity assurance (PIA) review, Selective Review and Invoicing Review, or for SPIN change or other requests. Service providers must retain FCC Form 473, FCC Form 474 and FCC Form 498, as well as service check documents. In addition, beneficiaries must retain documents to provide compliance with other program rules, such as records relevant to show compliance with CIPA.[92]

49. We emphasize that the rule we adopt here requires that program participants retain all documents necessary to demonstrate compliance with the statute and Commission rules regarding the application for, receipt, and delivery of services receiving schools and libraries discounts. Thus, the descriptive list above is provided as a guideline but cannot be considered exhaustive. For example, service providers must provide beneficiaries' billing records, if requested, and will be held accountable for properly billing those applicants for discounted services and for complying with other rules specifically applicable to service providers. Service providers are responsible for maintaining records only with respect to the services they actually provide, not records for applicants on whose contracts they may have bid, but not won.[93]

50. We make additional clarifications to our rules providing for audits of program beneficiaries and service providers participating in the program. In particular, we clarify that schools, libraries, and service providers remain subject to both random audits and to other audits (or investigations) to examine an entity's compliance with the statute and the Commission's rules initiated at the discretion of the Commission, USAC, or another authorized governmental oversight body. We also

[92] See 47 C.F.R. § 54.520.

[93] *See* BellSouth Comments at 9-10; California Reply Comments at 9.

conclude that failing to comply with an authorized audit or other investigation conducted pursuant to section 54.516 of the Commission's rules (*e.g.*, failing to retain records or failing to make available required documentation) is a rule violation that may warrant recovery of universal service support monies that were previously disbursed for the time period for which such information is being sought.[94]

### C. Technology Plans

#### 1. Background

51. To ensure that applicants make appropriate decisions regarding the services for which they seek discount, the Commission requires applicants to base their request for services on an approved technology plan.[95] The Commission specifically required that technology plans be independently approved, to ensure the plans are based on the "reasonable needs . . . of the applicants and are consistent with the goals of the program."[96]

52. In the *Schools and Libraries Further Notice* and *Schools and Libraries Second Further Notice,* we sought comment on whether the Commission should revise its rules regarding two aspects of technology plans, the timing of their approval and their content.[97] With regard to the timing of plan approval, section 54.504(b)(2)(vii) of the Commission's rules states that the applicant must certify in its FCC Form 470 that it has a technology plan that has been certified by its state, the Administrator, or an independent entity approved by the Commission.[98] We also noted that the instructions for FCC Form 470 permit applicants to certify that their technology plan will be approved by the relevant body no later than when service commences.[99]

53. With regard to plan content, we note that the Commission adopted specific requirements for information that must be included in the technology assessment in the FCC Form 470,[100] but did not adopt specific rules addressing the required content of the technology plan. In the *Universal Service Order*, however, the Commission indicated that applicants should provide certain information prior to placing an order for supported services.[101] We sought comment on whether we should codify USAC's current guidelines regarding technology plans.[102]

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[94] *See also Universal Service Order*, 12 FCC Rcd at 9081, para. 581 (eligibility for support is conditioned on schools' and libraries' consent to cooperate in future random compliance audits to ensure that services are being used appropriately).

[95] *See* 47 U.S.C. § 254(h)(1)(B); *Universal Service Order,* 12 FCC Rcd at 9078 para. 574. The Commission does not require applicants to develop technology plans, however, for local and long distance service and cellular service. *See Request for Review of the Decision of the Universal Service Administrator by United Talmudical Academy, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 16 FCC Rcd 18812 (2001).

[96] *Universal Service Order*, 12 FCC Rcd at 9078 para. 574.

[97] *See Further Notice,* 18 FCC Rcd at 9235 paras. 99-100; *Schools and Libraries Second Further Notice,* 18 FCC Rcd at 26950-51 para 94.

[98] 47 C.F.R. § 54.505(b)(2)(vii); *see also Universal Service Order,* 12 FCC Rcd at 9078 para. 574.

[99] FCC Form 470 Instructions.

[100] 47 C.F.R. § 54.504(b).

[101] *Universal Service Order*, 12 FCC Rcd at 9077 para. 572.

[102] *See Schools and Libraries Second Further Notice* at para 94 ; *see also* http://www.sl.universalservice.org/apply/step2.asp. Under USAC's guidelines, a technology plan should address the following areas. The plan must establish clear goals and a realistic strategy for using telecommunications and

(continued....)

54. We also sought comment on whether the Commission should require that, as part of the technology plan process, applicants analyze the cost of leasing versus purchasing E-rate eligible products and services or consider the most cost-effective way to meet its educational objectives. In addition, we sought comment on whether the Commission's technology planning requirements should be amended to be made more consistent with the technology planning goals and requirements of the U.S. Department of Education and the U.S. Institute for Museum and Library Services.[103] We also sought comment on whether the Commission's technology planning requirements could be strengthened through additional or different qualifications for entities, including states, which approve technology plans.

### 2. Discussion

55. To ensure transparency and consistency in the application of our rules we now modify our requirements regarding technology plan timing and content. Our revised rules require applicants to have an approved technology plan in place before the start of services and to certify at the time that they apply for discounts that their receipt of e-rate support is contingent upon timely approval of the technology plan. Our revised rules also largely adopt the United States Department of Education guidelines for technology plan content, and, in cases where applicants do not fall under the ambit of the Department of Education technology planning requirement, we adopt requirements consistent with USAC's guidelines. Because we continue to believe that the focus of technology planning should be research and planning for technology needs, we decline at this time to adopt rules to require technology plans to include an analysis of the cost of leasing versus purchasing E-rate eligible products and services or a showing that the applicant has considered the most cost-effective way to meet its educational objectives. We see no need, at this time, to address the question of what specific qualifications technology plan approvers should have. We note that the technology plans of libraries and public schools are already reviewed by individual states, and that USAC certifies reviewers for non-public schools.[104] As we describe below, the state is the certified technology plan approver for libraries and public schools, and we codify this practice in this order. We modify our rules so that non-public schools and entities that cannot or do not choose to secure approval of their technology plan from their states may obtain technology plan approval from USAC-certified entities.

56. <u>Technology Plan Timing</u>. We revise section 54.504(b)(2)(vii) so that applicants with technology plans that have not yet been approved when they file FCC Form 470 must certify that they understand their technology plans must be approved prior to the commencement of service. In making this change, we recognize that the timing of technology plan approval in particular states and localities may not coincide perfectly with the application cycle of the schools and libraries support mechanism. At the same time, we emphasize that applicants still are expected to develop a technology plan prior to requesting bids on services in FCC Form 470; all that we are deferring is the timing of the approval of such plan by the state or other approved certifying body. Second, we amend our rules to require that

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information technology to improve education or library services. The plan must have a professional development strategy to ensure that the staff understands how to use these new technologies to improve education or library services. The plan must include an assessment of the telecommunication services, hardware, software, and other services that will be needed to improve education or library services. The plan must provide for a sufficient budget to acquire and support the non-discounted elements of the plan: the hardware, software, professional development, and other services that will be needed to implement the strategy. Finally, the plan must include an evaluation process that enables the school or library to monitor progress toward the specified goals and make mid-course corrections in response to new developments and opportunities as they arise.

[103] *See Task Force Recommendation* at 5; *see also* http://www.nationaledtechplan.org/ (seeking comment developing the nation's third National Education Technology Plan).

[104] For the District of Columbia and the United States territories, the federal Department of Education is the certified approver of technology plans.

applicants formally certify, in FCC Form 486, that the technology plans on which they based their purchases were approved before they began to receive service. This revision conforms our rules to the current instructions for filing FCC Form 470 and is consistent with the views of commenters.[105] The revision permits applicants to meet our technology plan requirements as long as their technology plans will be approved before they begin receiving service. It also ensures that applicants formally confirm that their technology plans were approved when service begins.

57. In light of the current inconsistency between our rules and the instructions to FCC Form 470, we conclude that it is appropriate to waive the rule for the limited purpose of extinguishing liability for recovery of funds in the narrow circumstance in which a beneficiary obtained approval of its technology plan after the filing of FCC Form 470, but before service commenced. We hereby grant a waiver of section 54.504(b)(2)(vii) of our rules to all applicants that failed to have a technology plan approved at the time they filed their FCC Form 470 or that had obtained approval of a technology plan that covered only part of the funding year, but that obtained approval of a plan that covered the entire funding year before the commencement of service in the relevant funding year. We conclude that in this situation, it would not serve the public interest to enforce the terms of section 54.504(b)(2)(vii) in light of the ambiguity created by the phrasing of the certification contained in the current FCC Form 470. We emphasize, however, that this limited waiver does not extend to instances where the applicant failed to obtain an approval of a technology plan at all. Such failure to obtain any approval is inconsistent with our rules and warrants recovery of all funds disbursed under the relevant funding requests.

58. <u>*Technology Plan Content.*</u> We conclude that technology plans should continue to focus on ensuring that technologies are used effectively to achieve educational goals rather than assuming a greater role in monitoring the procurement process. We reiterate our conclusion that the technology plan should focus on "research and planning for technology needs "[106] rather than act as preliminary RFPs.[107] Thus, while we expect that applicants will compare purchase and leasing options and the cost-effectiveness of different technologies as part of their procurement processes, we decline, consistent with the views of most commenters, to add a requirement that these matters be addressed in technology plans.[108]

59. We agree with the virtually unanimous view of commenters that the Commission's technology plan requirements should be harmonized with the technology planning goals and requirements of the U.S. Department of Education and the U.S. Institute for Museum and Library Services.[109] In fact, USAC has already been treating technology plans approved under the Department of Education's Enhancing Education Through Technology (EETT) as acceptable technology plans subject to one qualification. Consistent with the Commission requirement that program applicants demonstrate that they have the necessary resources required to utilize e-rate discounts, USAC has required that the EETT technology plans be supplemented by an analysis that indicates that the applicant is aware of and will be able to secure the financial resources it will need to achieve its technology aims, including technology training, software, and other elements outside the coverage of the Commission's support program. We

[105] ALA Comments at 8; BellSouth Comments at 10; E-rate Complete, LLC Comments at 9.

[106] *Ysleta Order.*

[107] AASA/AESA Comments at 6; ALA Comments at 10-12; BellSouth Comments at 4-5; CoSN Comments at 11; ISBE Comments at 16, 17.

[108] AASA/AESA Comments of 6; AEWG Comments of 6; Alaska EED Comments at 9; Aumann Comments of 3-4; CoSN Comments at 11; EdLiNC Comments of 11; E-rate Central Comments of 9; Funds for Learning, LLC Comments at 4, 12; ISBE Comments of 16; MOREnet Reply Comments at 3; WIDPI Reply Comments at 2-3.

[109] AASA/AESA Comments at 6; AEWG Comments at 6; Alaska EED Comments at 3; Aumann Comments at 4; California Reply Comments at 10; E-rate Central Comments at 9; ISBE Comments at 16 all support this. None oppose it.

adopt this existing policy in recognition of the Department of Education's expertise and USAC's attention to our requirement that applicants show that they have done the necessary planning and are able to secure the required resources to effectively employ the services they desire to purchase. Accordingly, we adopt a rule that codifies this method of compliance with the technology plan requirement.

60. We also adopt a rule that applicants that do not have EETT technology plans, must demonstrate that their plans contain the following elements:

(1) establish clear goals and a realistic strategy for using telecommunications and information technology to improve education or library services;
(2) have a professional development strategy to ensure that the staff understands how to use these new technologies to improve education or library services;
(3) include an assessment of the telecommunication services, hardware, software, and other services that will be needed to improve education or library services;
(4) provide for a sufficient budget to acquire and support the non-discounted elements of the plan: the hardware, software, professional development, and other services that will be needed to implement the strategy; and
(5) include an evaluation process that enables the school or library to monitor progress toward the specified goals and make mid-course corrections in response to new developments and opportunities as they arise.[110]

With these elements included in technology plans, applicants will be demonstrating at an early stage of the application process that they are or are preparing to be in compliance with the Commission's rules.

61. Consistent with this rule, the ability of an entity whose technology plan complies with the criteria in the preceding paragraphs to order services is only limited by the scope of its technology plan's strategy for using telecommunications services and information technology to meet its educational goals.[111] Commenters should not fear that strengthened technology plan requirements will lock them into specific services.[112] In fact, applicants are free to switch from wireline to wireless technologies, from high to even higher speed transmission speeds, and to make other similar changes in the services they order as long as those services are designed to deliver the educational applications they have prepared to provide.[113] Only if an applicant desires to order services beyond the scope of its existing technology plan does it need to prepare and seek timely approval of an appropriately revised technology plan.

62. We also decline at this time to take any of the other actions regarding technology plans suggested by commenters. We decline to adopt ALA's suggestion that we require separate filings of proposals to provide service and prices,[114] since we find that it would be much more costly for USAC to process such filings separately, given the redundancy. We decline to require USAC to provide examples of acceptable technology plans[115] given that applicants can already approach their states or other entities from which they must gain certification for such examples. Although we do not require technology plans from those seeking only "POTS" local and long distance telecommunications services, or cellular service, we decline to eliminate the requirement for those seeking internet access,[116] because we believe that

[110] These requirements are consistent with the USAC guidelines for technology plan content.

[111] *See also Ysleta Order*, 18 FCC Rcd at 26419-20 para 28.

[112] *See* ISBE Comments at 17.

[113] *See* Alaska EED Comments at 10; ISBE Comments at 17; LaErate Reply Comments at 8.

[114] ALA Comments at 9.

[115] Aumann Comments at 3-4.

[116] *Id.* at 3.

certified plans are important to ensuring that applicants have carefully considered how to employ the service. For administrative efficiency, we also decline to require all applicants to submit their technology plans as attachments to current forms,[117] but note that USAC may request submission of a technology plan for any applicant as part of the application review process and that such plans are subject to the document retention rules adopted in this order. As such, a violation of the technology plan rules we adopt herein will be subject to recovery on a prospective basis.

63. *Technology Plan Approval*. We also modify our rules to address non-public schools that are not eligible to secure approval of their technology plan from their states. USAC has been handling this matter by permitting such schools to obtain approval of their plans from entities that USAC has certified as qualified to provide such evaluations and approval. We now amend our rules to codify this practice.

### D. Certifications

#### 1. Background

64. Applicants must comply with several certification requirements when requesting discounts on eligible services. Some of these certifications appear on the FCC Form 470, Description of Services Requested and Certification Form, and the FCC Form 471, Services Ordered and Certification Form.[118] Currently, the certification criteria listed on the FCC Forms 470 and 471 do not mirror the specific language in the certifications provided for in the Commission's rules.[119] Because the certification language in the forms is consistent with the intent of our rules and more closely resembles the real world experience, we take this opportunity to revise the Commission's rules to make clear that the certification language on the FCC Forms 470 and 471 conforms to the rules.[120] In addition, we add a service provider certification to FCC Form 473 to further our goal of preventing waste, fraud and abuse.

#### 2. Discussion

65. *Form 470*. Section 54.504 of the Commission's rules governs applicants' requests for services and provides specific requirements for completing the FCC Form 470.[121] Pursuant to section 54.504(b)(2), there are several requirements to which applicants must certify compliance before submitting their FCC Form 470 applications. Most of these certification requirements are also listed in Block 5 of the FCC Form 470. However, as noted above, the language in the form does not mirror the precise language in the rule. In particular, section 54.504(b)(2)(v) of the Commission's rules states that applicants certify that "all of the necessary funding in the current funding year has been budgeted and approved to pay for the 'non-discount' portion of requested connections and services, as well as any necessary hardware or software, and to undertake the necessary staff training required to use the services effectively."[122] The form states more generally, however, that applicants must certify that "support under

[117] AEWG Comments at 6.

[118] *See* Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806, Item 23 (May 2003) (FCC Form 470); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806, Item 25 (November 2003) (FCC Form 471).

[119] *See* 47 C.F.R. § 54.504(b)(2).

[120] We conclude that these changes are exempt from the notice and comment requirements of the Administrative Procedure Act because they concern non-substantive technical changes to the existing rules. *See* 5 U.S.C. § 553(b)(3).

[121] 47 C.F.R. § 54.504.

[122] 47 C.F.R. § 54.504(b)(2)(v).

the support mechanism is conditional upon the school(s) and library(ies) securing access to all of the resources, including computers, training, software, maintenance, and electrical connections necessary to use the services purchased effectively."[123]

66. As explained above, the certification language on the FCC Form 470 is consistent with the intent of the rule and more closely resembles the real-world experience. Therefore, we revise the current language of section 54.504(b)(2)(v) to require applicants to certify that support under the support mechanism is conditional. We replace the current language of section 54.504(b)(2)(v) with the following sentence: "Support under this support mechanism is conditional upon the school(s) and library(ies) securing access to all of the resources, including computers, training, software, maintenance, internal connections, and electrical connections necessary to use the services purchased effectively. "[124] In addition, we re-designate the current section number 54.504(b)(2)(v) as new section number 54.504(b)(2)(vi). We believe these revisions will facilitate the ability of applicants to determine what certifications are necessary for proper completion of the application and will facilitate our enforcement and oversight activities.

67. Furthermore, to emphasize that applicants must make cost effective service selections consistent with the *Ysleta Order*, we will require applicants to certify on the Form 470 that the services for which bids are being sought are the most cost effective means for meeting their educational needs and technology plan goals. Therefore, we modify section 54.504(b)(2) to add a new certification, section 54.504(b)(2)(vii), which states the following: "All bids submitted will be carefully considered and the bid selected will be for the most cost-effective service or equipment offering, with price being the primary factor, and will be the most cost-effective means of meeting educational needs and technology plan goals."

68. *Form 471*. Under section 54.504(c) of the Commission's rules, applicants are required to submit a completed FCC Form 471 after signing a contract for eligible services. Like the FCC Form 470, the FCC Form 471 lists several matters to which applicants must certify in order to have their applications considered.[125] Currently, however, these requirements are not expressly addressed in Part 54 of the Commission's rules. We therefore find it appropriate to amend section 54.504(c) of the Commission's rules by adding a new subsection (1) which will state that the FCC Form 471 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification that the entity(ies) is/are eligible to receive support and has/have secured access to all of the resources necessary to make effective use of the service purchased; the entity(ies) is/are covered by technology plans that have been or will be approved by a state or other authorized body; the entity(ies) has/have complied with program rules as well as all state and local laws regarding procurement of services; the services will be used solely for educational purposes and will not be sold, resold, or transferred; the applicant understands that the discount level used for shared services is conditional; and the applicant recognizes that its application may be audited.[126] We conclude that codifying these existing certification requirements in the Commission's rules will diminish confusion regarding the criteria to which applicants must certify when completing their FCC Forms 471 while enhancing our enforcement and oversight activities.

69. Consistent with the requirement imposed on the Form 470, we will require applicants to certify on the Form 471 that the selection of services and service providers is based on the most cost effective means of meeting educational needs and technology plan goals. Therefore, we modify section

[123] *See* FCC Form 470, Item 23; *but see,* 47 C.F.R. § 54.504(b)(2)(v).

[124] *See* FCC Form 471, Item 23.

[125] FCC Form 471, Block 6.

[126] *See infra* Appendix B. *See also* FCC Form 471, Block 6.

54.504(c)(1) to add a new certification, section 54.504(c)(1)(xi), which states the following: "All bids submitted were carefully considered and the most cost-effective bid for services or equipment was selected, with price being the primary factor considered, and is the most cost-effective means of meeting educational needs and technology plan goals."

70. *Form 473*. In the *Schools and Libraries Second Further Notice,* we sought comment on whether the Commission, as a condition of support, should require each service provider to make certifications that it has not sought to subvert the effectiveness of the E-rate program's competitive bidding process.[127] Although the Commission recognized that many of those subversive actions are already prohibited by the federal antitrust laws, if not other state or federal statutes or rules, it observed that requiring such certifications would better enable the Commission or other government agencies to enforce the Commission's rules and to seek criminal sanctions where appropriate.[128]

71. We now adopt three certification requirements modeled after the certificate of independent price determination required under federal acquisition regulations, as referenced in the *Schools and Libraries Second Further Notice.*[129] These certifications will serve to emphasize to potential service providers that any practices that thwart the competitive bidding process will not be tolerated, and will facilitate the ability of government agencies to prosecute any misdeeds in this area. Service providers receiving funds through the E-rate program accordingly now must make the following certifications with respect to their participation in the competitive bidding process of the E-rate program in the Service Provider Annual Certification Form, FCC Form 473:

> 1. I certify that the prices in any offer that this service provider makes pursuant to the schools and libraries universal service support program have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered;
>
> 2. I certify that the prices in any offer that this service provider makes pursuant to the schools and libraries universal service support program will not be knowingly disclosed by this service provider, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and
>
> 3. I certify that no attempt will be made by this service provider to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

## IV. ORDER

72. In this order, we set forth how audit findings related to the schools and libraries support mechanism shall be resolved. This discussion applies to audits conducted by USAC's own internal audit division, as well as audits conducted by independent public accounting firms under contract to USAC.

73. As modified above, USAC shall continue to recover funds whenever it discovers a statutory or rule violation, as described above.[130] The standard for determining such a violation is the

[127] *See Schools and Libraries Second Further Notice,* 18 FCC Rcd at 26939 para. 66.

[128] *Id. See* Sherman Act, 15 U.S.C. § 1.

[129] *Id. See* 48 C.F.R. § 52.203-2.

[130] *See supra* part III.A.2.

same standard that we use in our enforcement actions: specifically, whether a party has willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission,[131] based on a preponderance of the evidence.[132] To the extent audit findings raise matters outside the scope of our orders or existing rules, we expect USAC to clearly identify such findings to the agency.

74. We conclude that a standardized, uniform process for resolving audit findings is necessary, and we direct USAC to submit, no later than 45 days from the publication in the Federal Register, a proposed plan for resolving audit findings. USAC's audit resolution plan should detail USAC's proposed procedures for resolving all findings arising from audits conducted by USAC's internal audit department, independent public accounting firms under contract with USAC, or government audit organizations.[133] In addition, USAC's audit resolution plan should specify deadlines to ensure audit findings are resolved in a timely manner.

75. We have set forth in the accompanying Fifth Report and Order a general framework for what amounts should be recovered in specific situations, and we expect future audits to be resolved consistent with that framework. To the extent audits in the future raise issues not addressed herein, we provide a limited delegation to the Wireline Competition Bureau to address such matters. In particular, we direct the Chief of the Wireline Competition Bureau to address audit findings and to act on requests for waiver of rules warranting recovery of funds.[134] We hereby amend sections 0.91 and 0.291 to reflect such delegation of authority in this limited instance. We emphasize the limited nature of this delegation which we adopt because of the importance of providing rapid responses to audit findings and requests for

[131] 47 U.S.C. §503(b); 47 C.F.R. § 1.80(a)(1). Under the Communications Act, a party "willfully" violates the Communications Act or a Commission rule or order when it knows it is taking the action in question, irrespective of any intention to violate the Commission's rules. *See, e.g., SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 7589, 7591 para. 4 and n.14 (2002) (citing, among other things, 47 U.S.C. 312(f); Southern *California Broadcasting Co., Licensee, Radio Station KIEV(AM) Glendale, California*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 para. 5 (1991)). "Repeated" means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting*, 6 FCC Rcd at 4388; *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 (2001).

[132] *See, e.g., Tuscola Broadcasting Co.*, Memorandum Opinion and Order, 76 FCC 2d 367, 371 (1980) (applying preponderance of evidence standard in reviewing Bureau level forfeiture order). *Cf.* 47 U.S.C. § 312(d) (assigning burden of proof in hearings to Commission).

[133] We note that the Commission's rules require audits of universal service programs and funds to be conducted in accordance with government auditing standards. USAC's audit resolution plan should be consistent with government auditing standards by, for example, providing a formal process for informing audited beneficiaries of the audit results (*e.g.*, submitting a draft audit report to the audited beneficiary for comment, affording an opportunity to provide formal written comments to the final audit report, etc). *See* General Accounting Office, GOVERNMENT AUDITING STANDARDS: 2003 REVISION, GAO-03-673G, §§ 6.01, 6.05 (Jun. 2003) ("GAGAS HANDBOOK") (specifying differences between government auditing standards and private sector auditing standards for certain audits).

[134] In this regard, we recognize that there may be mitigating circumstances which warrant waiver of a rule. The Commission's rules may be waived when good cause is demonstrated. 47 C.F.R. § 1.3; *see also WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (1990). In doing so, we may take into account, on a case-specific basis, considerations of hardship, equity, or more effective implementation of overall policy. Waiver is appropriate only if special circumstances warrant deviation from the general rule, and such a deviation will serve the public interest. Such determinations necessarily are fact specific, and each must be judged individually. Any waiver of a rule would necessarily absolve any obligation to recover funds for the rule violation. As previously noted, we lack the authority to waive statutory violations.

waiver of rules warranting recovery of funds.[135] We also emphasize that any party aggrieved by any action by the Bureau is, of course, free to seek review by this Commission, pursuant to section 1.115 and commit that we will address any such appeal within six months.[136] Moreover, any action by USAC implementing direction from the Bureau is subject to full Commission review pursuant to section 54.723(b).[137]

76. The Managing Director is the agency' designated follow-up official.[138] Pursuant to the Commission's Audit Follow-up Directive, that office ensures that systems for audit follow-up and resolution are documented and in place, that timely responses are made to all audit reports, and that corrective actions are taken.[139] We clarify that the Office of Managing Director remains the agency's audit follow-up official, and that all actions taken by the Wireline Competition Bureau relating to E-rate fund audits shall be consistent with the agency's general framework for audit resolution and follow-up.

77. USAC shall maintain records of the status of all audit reports and any recommendations made therein, and make such records available to the Commission upon request.[140] USAC also shall submit a report to the Commission on a semi-annual basis summarizing the status of all outstanding audit findings. To the extent findings cannot be resolved within six months, USAC shall describe the status of its efforts, and provide a projected timeframe for completion. We also note that USAC's determination concerning the resolution of audit findings does not limit the Enforcement Bureau's ability to take enforcement action for any statutory or rule violation pursuant to section 503 of the Act.

78. We recognize that, to date, a number of audit reports have contained findings that indicate noncompliance with USAC administrative procedures. Consistent with its obligation to administer this support mechanism without waste, fraud and abuse,[141] we expect USAC to identify for Commission consideration on at least an annual basis all findings raising management concerns that are not addressed by the Commission's existing rules and precedent, and, as appropriate, identify any USAC administrative procedures that should be codified in our rules to facilitate program oversight.[142]

79. Recently, issues have been raised regarding recovery of funds disbursed in instances when applicants failed to follow certain USAC administrative procedures.[143] As discussed above, a number of these procedures, such as guidelines for the content of technology plans and specific guidance on document retention, are being incorporated into the Commission's rules, and their violation may warrant recovery of universal service monies on a prospective basis. We believe that it will be

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[135] *See* Semiannual Report to Congress, October 1, 2003-March 31, 2004, Office of the Inspector General, Federal Communications Commission at 8-9.

[136] 47 C.F.R. § 1.115.

[137] 47 C.F.R. § 54.723(b).

[138] FCC Directive FCCINST 1013.lC, Audit Follow-up, at §5(b) (July 2002) (Audit Follow-up Directive).

[139] *Id*.at § 5(b). Pursuant to the Commission's Audit Follow-up Directive, WCB reviews audit reports, prepares responses to audit reports, informs the Audit Follow-up Official of significant disagreements, accomplishes and initiates all appropriate corrective action, directs and monitors implementation of promised corrective action, and maintains appropriate records. Id. at §5(a).

[140] 47 C.F.R. § 54.702(j).

[141] 47 C.F.R. § 54.717.

[142] Such recommendations would be within the scope of USAC's authorization to advocate positions before this Commission on administrative matters. 47 C.F.R. § 54.702(d).

[143] Semiannual Report to Congress, October 1, 2003-March 31, 2004, Office of the Inspector General, Federal Communications Commission.

particularly useful to continue to evaluate, on an ongoing basis, whether other procedures adopted by USAC should also be incorporated into the rules and whether their violation should also warrant recovery of previously disbursed monies.

80. We believe that USAC's experience in processing tens of thousands of these applications provides it with insightful information regarding ways in which waste, fraud and abuse may occur in that process. Based on that information, we believe that USAC's development of procedures to serve our objective to prevent waste, fraud and abuse is invaluable. We direct USAC to submit to the Commission within 45 days from publication in the Federal Register, and annually thereafter, a list summarizing all current USAC administrative procedures identifying, where appropriate, the specific rules or statutory requirements that such procedures further, and those procedures that serve to protect against waste, fraud and abuse. We shall review those procedures to determine whether action is needed to ensure appropriate recovery, and shall determine whether such procedures should be adopted as binding rules. Thereafter, USAC and the Commission will generally seek recovery of funds disbursed in violation of the statute or a rule that implements the statute or substantive program goal or that serves to protect against waste, fraud and abuse. USAC and the Commission will not seek recovery of funds disbursed in violation of other rules, except to the extent that such rules are important to ensuring the financial integrity of the program, as designated by the agency.[144]

## V. PROCEDURAL MATTERS

### A. Paperwork Reduction Act Analysis

81. This document contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

82. In this present document, we have assessed the effects of the measures adopted to protect against waste, fraud and abuse in the administration of the schools and libraries universal service support mechanism, and find that the added certification requirements in various FCC Forms will not be unduly burdensome on small businesses.

### B. Final Regulatory Flexibility Analysis

83. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[145] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Schools and Libraries Second Further Notice*.[146] The Commission sought written public comment on the proposals in the *Schools and Libraries Second Further Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[147]

[144] Examples are minimum processing standards and deadlines for submission of invoices.

[145] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[146] *Schools and Libraries Second Further Notice*, 18 FCC Rcd at 26963-67.

[147] *See* 5 U.S.C. § 604.

### 1. *Need for, and Objectives of, the Fifth Report and Order*

84. In this *Fifth Report and Order*, we adopt measures to protect against waste, fraud and abuse in the administration of the schools and libraries universal service support mechanism, particularly with regard to audit requirements and how to respond to audit findings. We set forth a framework for how much USAC should seek recovery when violations are found and set a five year administrative limitations period for such recovery actions as well as a corresponding five year document retention rule. We also eliminate the option of allowing parties to offset current debts to USAC against expected future payments, and we bar those with outstanding debts to the fund from receiving additional amounts. We also conform our rules concerning the content of and timing of certifications regarding technology plans to current practices. These rules will advance the goals of the schools and libraries program by deterring waste, fraud and abuse, leaving more support available applicants.

### 2. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

85. There were no comments filed specifically in response to the IRFA. Nevertheless, the agency has considered the potential impact of the rules proposed in the IRFA on small entities. Based on analysis of the relevant data, the Commission concludes the new rules limit the burdens on small entities and result in a de minimis recordkeeping requirement. The Commission also concludes that the new rules will positively impact schools and libraries, including small ones, seeking universal service support.

### 3. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

86. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[148] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[149] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[150] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[151] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[152] Nationwide, as of 1992, there were approximately 275,801 small organizations.[153] The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[154] As of 1997, there

[148] 5 U.S.C. § 603(b)(3).

[149] 5 U.S.C. § 601(6).

[150] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[151] Small Business Act, 15 U.S.C. § 632.

[152] 5 U.S.C. § 601(4).

[153] U.S. Census Bureau, 1992 Economic Census, Table 6 (special tabulation of data under contract to the Office of Advocacy of the U.S. Small Business Administration).

[154] 5 U.S.C. 601(5).

were about 87,453 governmental jurisdictions in the United States.[155] This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

87. The Commission has determined that the group of small entities directly affected by the rules herein includes eligible schools and libraries and the eligible service providers offering them discounted services, including telecommunications service providers, Internet Service Providers (ISPs) and vendors of internal connections.[156] Further descriptions of these entities are provided below. In addition, the Universal Service Administrative Company is a small organization (non-profit) under the RFA, and we believe that circumstances triggering the new reporting requirement will be limited[157] and does not constitute a significant economic impact on that entity.

### 4. Schools and Libraries

88. As noted, "small entity" includes non-profit and small government entities. Under the schools and libraries universal service support mechanism, which provides support for elementary and secondary schools and libraries, an elementary school is generally "a non-profit institutional day or residential school that provides elementary education, as determined under state law."[158] A secondary school is generally defined as "a non-profit institutional day or residential school that provides secondary education, as determined under state law," and not offering education beyond grade 12.[159] For-profit schools and libraries, and schools and libraries with endowments in excess of $50,000,000, are not eligible to receive discounts under the program, nor are libraries whose budgets are not completely separate from any schools.[160] Certain other statutory definitions apply as well.[161] The SBA has defined for-profit, elementary and secondary schools and libraries having $6 million or less in annual receipts as small entities.[162] In Funding Year 2 (July 1, 1999 to June 20, 2000) approximately 83,700 schools and 9,000 libraries received funding under the schools and libraries universal service mechanism. Although we are unable to estimate with precision the number of these entities that would qualify as small entities under SBA's size standard, we estimate that fewer than 83,700 schools and 9,000 libraries might be affected annually by our action, under current operation of the program.

### 5. Telecommunications Service Providers

89. We have included small incumbent local exchange carriers in this RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[163] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not

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[155] U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

[156] 47 C.F.R. §§ 54.502, 54.503, 54.517(b).

[157] *See supra* para. 27.

[158] 47 C.F.R. § 54.500(b).

[159] 47 C.F.R. § 54.500(j).

[160] 47 C.F.R. § 54.501.

[161] *See id.*

[162] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) codes 611110 and 519120 (NAICS 2002 code 519120 was previously 514120).

[163] 5 U.S.C. § 601(3).

"national" in scope.[164] We have therefore included small incumbent carriers in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

90. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small incumbent local exchange services. The closest size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[165] According to Commission data,[166] 1,337 incumbent carriers reported that they were engaged in the provision of local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted herein.

91. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs) and "Other Local Exchange Carriers."* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to providers of competitive exchange services or to competitive access providers or to "Other Local Exchange Carriers." The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[167] According to Commission data,[168] 609 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 companies, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees.[169] In addition, 35 carriers reported that they were "Other Local Exchange Carriers." Of the 35 "Other Local Exchange Carriers," an estimated 34 have 1,500 or fewer employees and one has more than 1,500 employees.[170] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, and "Other Local Exchange Carriers" are small entities that may be affected by the rules and policies adopted herein.

92. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[171] According to the Commission's most recent data,[172] 261 companies reported that their primary telecommunications service activity was

[164] *See* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC, dated May 27, 1999. The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

[165] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

[166] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Aug. 2003). This source uses data that are current as of December 31, 2001.

[167] 13 CFR § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

[168] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Aug. 2003).

[169] *Id.*

[170] *Id.*

[171] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

[172] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Aug. 2003).

the provision of payphone services. Of these 261 companies, an estimated 223 have 1,500 or fewer employees and 48 have more than 1,500 employees.[173] Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by the rules and policies adopted herein.

93. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless small businesses within the two separate categories of *Paging*[174] and *Cellular and Other Wireless Telecommunications*.[175] Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. According to the Commission's most recent data,[176] 1,761 companies reported that they were engaged in the provision of wireless service. Of these 1,761 companies, an estimated 1,175 have 1,500 or fewer employees and 586 have more than 1,500 employees.[177] Consequently, the Commission estimates that most wireless service providers are small entities that may be affected by the rules and policies adopted herein.

94. *Private and Common Carrier Paging.* In the Paging *Third Report and Order*, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[178] A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.[179] Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private-Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to Commission data, 474 carriers reported that they were engaged in the provision of either paging and messaging services or other mobile services.[180] Of those, the Commission estimates that 457 are small, under the SBA approved small business size standard.[181]

### 6. Internet Service Providers

95. *Internet Service Providers.* The SBA has developed a small business size standard for

[173] *Id.*

[174] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513321 (changed to 517211 in October 2002).

[175] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513322 (changed to 517212 in October 2002).

[176] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service, Table 5.3, (May 2002).

[177] *Id.*

[178] *In the Matter of Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, Third Report and Order, Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70 paras. 291-295 (1997).

[179] *In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10085 para. 98 (1999).

[180] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service, Table 5.3, p. 5-5 (Aug. 2003).

[181] *Id.*

"On-Line Information Services," NAICS code 514191.[182] This category comprises establishments "primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others."[183] Under this small business size standard, a small business is one having annual receipts of $18 million or less.[184] Based on firm size data provided by the Bureau of the Census, 3,123 firms are small under SBA's $18 million size standard for this category code.[185] Although some of these Internet Service Providers (ISPs) might not be independently owned and operated, we are unable at this time to estimate with greater precision the number of ISPs that would qualify as small business concerns under SBA's small business size standard. Consequently, we estimate that there are 3,123 or fewer small entity ISPs that may be affected by this analysis.

### 7. Vendors of Internal Connections

96. The Commission has not developed a small business size standard specifically directed toward manufacturers of internal network connections. The closest applicable definitions of a small entity are the size standards under the SBA rules applicable to manufacturers of "Radio and Television Broadcasting and Communications Equipment" (RTB) and "Other Communications Equipment."[186] According to the SBA's regulations, manufacturers of RTB or other communications equipment must have 750 or fewer employees in order to qualify as a small business.[187] The most recent available Census Bureau data indicates that there are 1,187 establishments with fewer than 1,000 employees in the United States that manufacture radio and television broadcasting and communications equipment, and 271 companies with less than 1,000 employees that manufacture other communications equipment.[188] Some of these manufacturers might not be independently owned and operated. Consequently, we estimate that the majority of the 1,458 internal connections manufacturers are small.

### 8. Miscellaneous Entities

97. *Wireless Communications Equipment Manufacturers*. The SBA has established a small business size standard for radio and television broadcasting and wireless communications equipment manufacturing. Under this standard, firms are considered small if they have 750 or fewer employees.[189] Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments[190] in

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[182] *See generally* North American Industry Classification System – United States (1997), NAICS code 514191.

[183] *See generally* North American Industry Classification System – United States (1997), NAICS code 514191.

[184] 13 C.F.R. § 121.201, NAICS code 514191.

[185] Office of Advocacy, U.S. Small Business Administration, Firm Size Data by Industry and Location.

[186] 13 C.F.R. § 121.201, NAICS Code 334220, 334290.

[187] *Id.*

[188] 1997 Economic Census, Manufacturing, Industry Series, Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, Document No. E97M-3342B (August 1999), at 9; 1997 Economic Census, Manufacturing, Industry Series, Other Communications Equipment Manufacturing, Document No. EC97M-3342C (September 1999), at 9 (both available at http://www.census.gov/prod/www/abs/97ecmani.html).

[189] *Id.*

[190] The number of "establishments" is a less helpful indicator of small business prevalence in this context than would be the number of "firms" or "companies," because the latter take into account the concept of common ownership or control. Any single physical locations for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks out data for firms or companies only to give the total number of such entities for 1997, which was 1,089.

this category.[191] Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. The percentage of wireless equipment manufacturers in this category is approximately 61.35%,[192] so the Commission estimates that the number of wireless equipment manufacturers with employment under 500 was actually closer to 706, with and additional 23 establishments having employment of between 500 and 999. Given the above, the Commission estimates that the majority of wireless communications equipment manufacturers are small businesses.

### 9. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

98. In this *Fifth Report and Order*, we eliminate the option that entities formerly had with respect to funds they had received from the program in error. Instead of requiring them to immediately repay such funds, the program rules allowed them to offset the amounts they owed against future payments that they were due. Unfortunately, as discussed above,[193] the administrative costs of tracking such debts appears to outweigh the benefits of the option and so it has been eliminated.

99. In our continuing effort to crack down on waste, fraud, and abuse by those who owe funds to the program, we also modify our rules to bring all E-rate program beneficiaries and service providers within the ambit of the program's "red light" rule: denying future funding to any party with outstanding debts to the program. To achieve this, we amend sections 1.8002 and 1.8003 of the Commission's rules to require all entities that participate in the schools and libraries universal service support program to obtain an FCC Registration Number. The agency has already certified that this process imposes only a de minimis burden.[194]

100. While we adopt a 5-year document retention rule, this rule should actually reduce, not increase, the burden on small businesses. After all, section 54.516 of the Commission rules previously required relevant documents to be retained by parties indefinitely. Those parties are no longer required to do so. Meanwhile, as discussed above, these record retention rules are required to ensure that program auditors can make full audits where and when they see fit,[195] thereby maximizing the amount of program funds available for legitimate uses. In particular such funds can help finance funding requests that are now approved but left unfunded due to a lack of funds.

101. Although the Commission has formalized its rules concerning the substance and timing of technology plans, the modified rules do not impose any additional, non-trivial burdens; they merely provide further guidance on the requirements of the current technology plan. Schools and libraries must now certify on FCC Form 486 that their technology plans had been approved before they started to receive any E-rate supported services based on them, but schools and libraries have always been required to prepare a technology plan on which to base their E-rate program product and service requests and to get that plan approved. The action of signing an additional time on a form that they already have to file to certify that they have complied with existing rules represents no more than a trivial burden.

102. The framework adopted today, setting forth what amounts should be recovered by USAC when specific statutory and Commission rule requirements are violated, does not involve additional

[191] U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, "Industry Statistics by Employment Size," Table 4, NAICS code 334220 (issued August 1999).

[192] *Id.* Table 5, "Industry Statistics by Industry and Primary Product Class Specialization: 1997."

[193] *See supra* para. 37.

[194] *See* In re Amendments of Parts 1, 21, 61, 73, 74, and 76 of the Commission's Rules, Adoption of a Mandatory FCC Registration Number, MD Docket No. 00-205, Report and Order, 16 FCC Rcd 16138 (2001).

[195] *See supra* para. 47.

reporting, recordkeeping, or compliance requirements for small entities. Similarly, the rule adopted in this *Fifth Report and Order*, adopting a five year administrative limitations period for initiation of fund recovery actions, does not involve additional reporting, recordkeeping, or compliance requirements for small entities. Rather, it reduces their recordkeeping requirements. The rules adopted, barring entities from receiving additional benefits under the schools and libraries program if they have failed to repay an outstanding debt to the fund, do not impose additional reporting, recordkeeping, or compliance requirements for small entities. Finally, other rules we adopt regarding the certification requirements made on FCC Forms do not require additional reporting or recordkeeping for small entities, as they merely conform our rules to current practices.

### 10. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

103. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[196]

104. Although we received no IRFA comments, we considered alternatives to the proposed recordkeeping requirements for small entities. Although we eliminated the options that schools and libraries had to offset amounts they owed to the fund due to rule violations against expected future payments, we did so only after giving the options a reasonable trial. We only eliminated them after concluding that they can involve a lengthy process resulting in a significant administrative burden on USAC, as discussed in more detail above.[197]

105. Although the Commission adopts the standards currently used by SLD, the rules clearly enable schools and libraries to minimize any duplicative administrative actions by permitting the technology plans that schools must prepare in response to the recent "No Child Left Behind" initiative to serve double duty to the extent that that is appropriate. Thus, schools whose plans have already been approved through the Department of Education's EETT need only meet the single additional standard of showing that they have sufficient resources to finance their portion of the cost of the entire implementation of using telecommunications to advance educational goals. Furthermore, we formally authorize USAC to certify entities that are qualified to approve the technology plans of non-public schools, among others.

106. The new requirement that schools and libraries certify – on FCC Form 486 – that their technology plans were already approved before they began receiving any E-rate supported also relaxes the former rule that required applicants to certify that their plans had been approved before they filed their FCC Form 470.

107. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.[198] In addition, the Commission will send a copy of this order in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act pursuant to 5 U.S.C. 801(a)(1)(A).

[196] 5 U.S.C. § 603(c)(1)-(4).

[197] *See supra* para. 38.

[198] *See* 5 U.S.C. § 604(b).

## VI. ORDERING CLAUSES

108. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 4(i), 4(j), 201-205, 214, 254, and 403 of the Communications Act of 1934, as amended, this Fifth Report and Order and Order IS ADOPTED.

109. IT IS FURTHER ORDERED that the Commission's rules, 47 C.F.R. Parts 0, 1 and 54 ARE AMENDED as set forth in the attached Appendix B, effective thirty (30) days after the publication of this Fifth Report and Order and Order in the Federal Register, except that the requirements subject to PRA are not effective until approved by OMB. The Commission will publish a document in the Federal Register announcing the effective date of the requirements.

110. IT IS FURTHER ORDERED that the Commission will send a copy of this Fifth Report and Order and Order, including the FRFA, in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

# APPENDIX A
## *LIST OF COMMENTERS*

| Commenter | Abbreviation |
|---|---|
| **Comments** | |
| Alaska Department of Education and Early Development and State Library | Alaska EED |
| American Association of School Administrators | AASA |
| Association of Educational Service Agencies | AESA |
| American Library Association | ALA |
| Arkansas E-rate Work Group | AEWG |
| Tim Aumann | Aumann |
| Avaya, Inc. | Avaya |
| BellSouth Corporation | BellSouth |
| Central Susquehanna Intermediate Unit | |
| Consortium for School Networking | CoSN |
| International Society for Technology in Education | ISTE |
| Council of the Great City Schools | |
| Cox Communications, Inc. | Cox |
| Eau Claire Area Schools | Eau Claire |
| Education and Libraries Networks Coalition | EdLiNC |
| E-Rate Central | |
| E-Rate Complete, LLC | |
| Fibertech Networks, LLC | Fibertech |
| Funds For Learning, LLC | |
| General Communication, Inc. | GCI |
| Illinois State Board of Education | ISBE |
| International Business Machines Corporation | IBM |
| Kellogg & Sovereign Consulting, LLC | K&S |
| Louisiana eRate Filers Organization | LaErate |
| National Association of State Utility Consumer Advocates | NASUCA |
| National Telecommunications Cooperative Association | NTCA |
| New York City Department of Education | NYCDOE |
| Northern Sierra Rural Health Network | NSRHN |
| Ohio SchoolNet Commission | OSNC |
| On-Tech | |
| Otsego Schools Cost Containment Committee | |
| Pennsylvania Department of Education | Pennsylvania DOE |
| Qwest Communications International Inc. | Qwest |
| Rural School and Community Trust | |
| SBC Communications Inc. | SBC |
| Shingletown Medical Center | |
| Sprint Corporation | Sprint |
| State E-Rate Coordinators' Alliance | SECA |
| Sunesys, Inc. | Sunesys |
| Turkal, John L. | |
| United Utilities, Inc. | United |
| Verizon Communications, Inc. | Verizon |
| Weisiger, Greg | Weisiger |
| WiscNet | |
| Wisconsin Department of Public Instruction | |
| WorldCom, Inc. | WorldCom |

| Commenter | Abbreviation |
|---|---|
| **Reply Comments** | |
| Alaska Department of Education and Early Development and State Library | Alaska EED |
| BellSouth Corporation | BellSouth |
| California Public Utilities Commission and the People of the State of California | California |
| Consortium for School Networking | CoSN |
| International Society for Technology in Education | ISTE |
| Council of the Great City Schools | |
| Cox Communications, Inc. | Cox |
| Fibertech Networks, LLC | Fibertech |
| Funds for Learning, LLC | |
| General Communication, Inc. | GCI |
| Hayes E-Government Resources, Inc. | Hayes |
| International Business Machines Corporation | IBM |
| Montana Independent Telecommunications Systems | MITS |
| MOREnet | |
| Nextel Communications, Inc. | Nextel |
| SBC Communications Inc. | SBC |
| Sprint Corporation | Sprint |
| State E-rate Coordinators Alliance | SECA |
| Sunesys, Inc. | Sunesys |
| Verizon Communications, Inc. | Verizon |
| Weisiger, Greg | |
| Wisconsin Department of Public Instruction | WIDPI |

## *APPENDIX B*
### FINAL RULES

Part 0 of the Commission's Rule and Regulations, Chapter 1 of Title 47 of the Code of Federal Regulations, is amended as follows:

1. Part 0, Subpart A is amended by adding section 0.91(n) to read as follows:

(n) Address audit findings relating to the schools and libraries support mechanism, subject to the overall authority of the Managing Director as the Commission's audit follow-up official.

2. Part 0, Subpart B is amending by adding 0.291(i) to read as follows:

(i) *Authority concerning schools and libraries support mechanism audits.* The Chief, Wireline Competition Bureau, shall have authority to address audit findings relating to the schools and libraries support mechanism. This authority is not subject to the limitation set forth in paragraph (a)(2) of this section.

Part 1 of the Commission's Rules and Regulations, Chapter 1 of Title 47 of the Code of Federal Regulations, is amended as follows:

1. Part 1, Subpart W is amended by adding section 1.8002(a)(6) to read as follows:

> (6) Any applicant or service provider participating in the Schools and Libraries Universal Service Support Program, part 54, subpart F, of this chapter.

2. Part 1, Subpart W is amended by modifying 1.8003 to read as follows:

The FRN must be provided with any filings requiring the payment of statutory charges under subpart G of this part, anyone applying for a license (whether or not a fee is required), including someone who is exempt from paying statutory charges under subpart G of this part, anyone participating in a spectrum auction, making up-front payments or deposits in a spectrum auction, anyone making a payment on an auction loan, anyone making a contribution to the Universal Service Fund, any applicant or service provider participating in the Schools and Libraries Universal Service Support Program, and anyone paying a forfeiture or other payment. A list of applications and other instances where the FRN is required will be posted on our Internet site and linked to the CORES page.

Part 54 of the Commission's Rules and Regulations, Chapter 1 of Title 47 of the Code of Federal Regulations, is amended as follows:

1. Part 54, Subpart F is amended by modifying section 54.504(b)(2) to read as follows:

> (2) FCC Form 470 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person's certification under oath that:
>
> (i) The schools meet the statutory definition of elementary and secondary schools found under section 254(h) of the Act, as amended in the No Child Left Behind Act of 2001, 20 U.S.C. §§ 7801(18) and (38), do not operate as for-profit businesses, and do not have endowments exceeding $50 million;